

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 30, 1999

LOUIS W. DYKHOFF, JR.,	:	
	:	
v.	:	Docket No. WEST 99-26-DM
	:	
U.S. BORAX INCORPORATED	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Riley, and Verheggen, Commissioners

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 16, 1999, the Commission's Office of Administrative Law Judges received from Louis W. Dykhoff, Jr. a petition for discretionary review of a decision issued by Administrative Law Judge Jerold Feldman on July 7, 1999. In his decision, Judge Feldman dismissed a discrimination complaint brought by Dykhoff under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). 21 FMSHRC 791 (July 1999) (ALJ). Dykhoff's petition was forwarded and received by the Commission's Docket Office on August 17.

The judge's jurisdiction over these cases terminated when his decision was issued on July 7, 1999. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Dykhoff's petition was received by the Commission's Office of Administrative Law Judge's on the fortieth day, August 16, past the 30-day deadline. Because the Commission did not sua sponte direct review of the case, Judge Feldman's decision became a final order of the Commission.

The Commission has entertained late-filed petitions for discretionary review where good cause has been shown. *See, e.g., De Atley Co.*, 18 FMSHRC 491, 492 (Apr. 1996) (excusing late filing of petition for discretionary review where operator's predecessor failed to inform operator of unconsummated settlement agreement). Typically, in such cases, a default order has been entered against a party, depriving the party of any opportunity to defend against the enforcement action taken by the Secretary. Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in

the absence of applicable Commission rules); *see, e.g., Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). Rule 60(b) motions are committed to the sound discretion of the judicial tribunal in which relief is sought. *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); *see Green Coal Co.*, 18 FMSHRC 1594, 1595 (Sept. 1996).

Here, Dykhoff has availed himself of the opportunity to bring his case before a judge. Dykhoff offers no explanation for his failure to timely submit a petition for discretionary review.¹ Thus, Dykhoff has failed to set forth grounds establishing that Fed. R. Civ. P. 60(b) relief is appropriate. *See Knock's Building Supplies*, 21 FMSHRC 483, 484 (May 1999) (denying motion to reopen when no explanation for late filing of petition for discretionary review offered); *Jim Walter Resources, Inc.*, 9 FMSHRC 388 (March 1987) (dismissing petition for discretionary review where no explanation for late filing offered).

¹ We are unwilling to speculate that Dykhoff “appears to have thought that he had 40, not 30, days in which to file his petition for discretionary review.” Slip op. at 4. Dykhoff attached to his petition for discretionary review a copy of section 113(d)(2) of the Mine Act, 30 U.S.C. § 823(d)(2), which sets forth the 30-day deadline for filing a petition for discretionary review. We also note that Dykhoff was represented by counsel at one point in these proceedings. 21 FMSHRC at 791 (noting “Neil M. Herring, Esq., on the brief . . . for the Complainant”). Under these circumstances, and because no possibility of default exists, we conclude that the Commission need not invite Dykhoff to provide an explanation for the late-filing.

For the foregoing reasons, Dykhoff's petition for discretionary review is denied as untimely filed.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioners Marks and Beatty, dissenting:

Commissioners Marks and Beatty dissent from the majority's order dismissing Dykhoff's petition for discretionary review on timeliness grounds. Dykhoff is an unrepresented, pro se miner who appears to have thought that he had 40, not 30, days in which to file his petition for discretionary review. Because Dykhoff was apparently not aware that his petition was untimely, he did not submit a separate motion for permission to excuse the late filing or provide any explanation of the circumstances surrounding the filing of his petition.² Under these circumstances, we would issue an order directing Dykhoff to provide a justification for his late filing, and allowing the parties an opportunity to address whether this case should be reopened. *See Turner v. New World Mining, Inc.*, 14 FMSHRC 76, 77 (Jan. 1992) (affording parties opportunity to address whether petition for discretionary review was timely filed and whether case should be reopened where petition was filed two days late and not treated as a PDR by Commission's docket office).

Marc Lincoln Marks, Commissioner

Robert H. Beatty, Jr., Commissioner

² The majority's approach has a serious impact on this pro se miner. *Compare Boone v. Rebel Coal Co.*, 4 FMSHRC 1232 (July 1982) (proceeding opened when counsel for operator delayed filing petition nearly four months). It is clear that Dykhoff is not represented at this stage of the proceedings. Accordingly, we believe that he should at least be afforded the opportunity to explain the reason for his minimal delay. *See* 29 C.F.R. § 2700.1(c); Commission Procedural Rule 1(c) ("These Rules shall be construed to . . . encourage the participation of miners.").

Distribution

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